

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAR 10 1969

WYATT ST. B. EUSTIS, JR.,

Appellant,

v.

NO. 22,809

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE
UNITED STATES OF AMERICA

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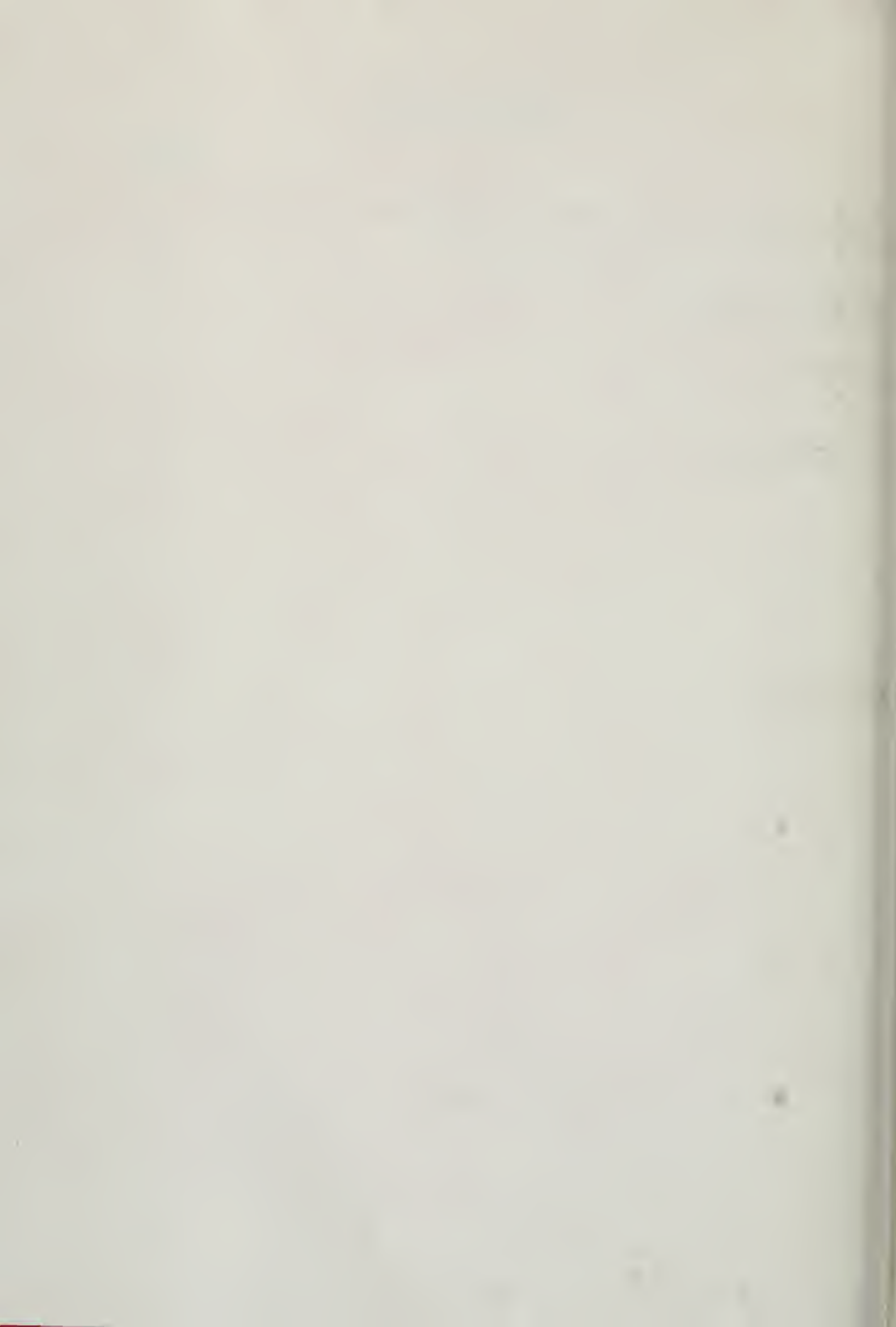


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UNITED STATES

I.

ISSUES PRESENTED FOR REVIEW

1. Was the evidence sufficient to sustain a finding that appellant's failure to file income tax returns for several successive years was wilful within the meaning of Title 26, United States Code Section 7203?

2. Did appellant and his counsel waive any right to inspect the presentence report?

II

STATEMENT OF THE CASE

The Nature of the Case: A criminal information was filed against appellant on October 11, 1967, for failure to file income tax returns for the years 1962, 1963 and 1964, in violation of 26 U.S.C. §7203. A jury was waived and the appellant proceeded to trial on February 8, 1968 before the Honorable William T. Sweigert. Appellant was represented by retained counsel, Dennis L. Woodman. At the close of the evidence the Court found the appellant guilty on all counts. On March 5, 1968, appellant was sentenced to a term of one year, all of which was suspended except for three months, and was ordered to pay a fine of \$8,000 on each count, same to be concurrent on all counts. Execution of sentence was stayed until May 1, 1968. On March 12, 1968, Notice of Appeal was filed. 1/

1/ Jurisdiction in the District Court was predicated upon 18 U.S.C. §3231. Jurisdiction on appeal is invoked under 18 U.S.C. §1291.

Statement of Facts: The appellant, a public accountant with long experience in tax matters, admitted to agents of the Internal Revenue Service when contacted in February of 1966 that he had not filed income tax returns since 1956. 2/ Appellant also advised the agents that for the years 1959 to 1964 he sought no extensions of time within which to file, although he was aware of the existence of such procedure, since he had filed for and received extensions within which to file his 1957 and 1958 income tax returns. 3/ Appellant testified that he had not filed timely returns due to the press of business. 4/ Appellant further testified that after receiving extensions with respect to his 1957 and 1958 returns, he decided thereafter not to bother with extensions because they were "trouble" and he would rather pay the penalties and interest. 5/

2/ Record, p. 11.
It was stipulated, for purposes of the trial, that Eustis was required by law to file a timely Federal tax return each year and that he knew he was required to do so each year.

3/ Record, pp. 13-14.

4/ Record, p. 33.

5/ Record, p. 14.

In February, 1966 Eustis was first contacted by agents of the Internal Revenue Service who were investigating his filing delinquencies. At the next meeting between the agents and the appellant, he presented to them completed Federal income tax returns for the years 1957 to 1964, which he stated had been prepared within the three-week interval since the prior meeting.^{6/} Appellant testified that he had also prepared and filed within that same three-week period all of his State income tax returns for the same delinquent years.^{7/}

III.

ARGUMENT

A.

The single issue before the District Court was whether the appellant's failure to file timely Federal income tax returns for each of the years 1958 through 1964 was wilful.^{8/} Having waived a jury

^{6/} Record, p. 40.

^{7/} Record, p. 42.

^{8/} The second issue before this Court arose subsequent to conviction, and concerns whether the District Court should have provided defense counsel with the pre-sentence report, absent a request for same.

and presented the matter to the District Court for trial, the appellant stipulated that he had been required to file timely income tax returns for each of said years; that he had been aware that he had received sufficient income during said years as to require the timely filing of such returns; but that he had not timely filed such returns. Upon such stipulation, the Government's evidence, and the testimony of the appellant, the Court found that Eustis had deliberately and intentionally failed to timely file the mentioned tax returns, and accordingly, a verdict of guilty was entered as to all counts.

The Court's decision was based upon evidence of facts and circumstances from which the inference could reasonably be drawn that appellant's failure to file such timely returns was wilful.

During the years in which appellant did not in fact make timely filings of his income tax returns, he maintained an active practice as a public accountant, wherein he was particularly concerned with the handling of the business and tax affairs of his particular clients. It was during this period that

he filed neither Federal nor State income tax returns for eight consecutive years.

Appellant claimed that the press of business affairs, particularly those of attending to the personal business and tax affairs of his clients, precluded him from the preparation and filing of his own individual tax returns. Yet, the evidence demonstrated that within three weeks from the time he was initially contacted by agents of the Internal Revenue Service, the appellant prepared both his Federal and State income tax returns for all eight years.

The defendant argued to the District Court that at best or worst his failure to file timely tax returns was negligent, and should be characterized in the fairy tale context of the "barefoot shoemaker's daughter". In light of all the evidence on the issue of wilfulness and intent, the District Court properly rejected this excuse of characterization.

This Court has passed upon the question of intent in comparable prosecutions of failure to file cases. Abdul v. United States (9th Cir. 1958), 254 F.2d 292, and Martin v. United States (9th Cir. 1963), 317 F.2d 753. The standards stated therein are

applicable to the record in the instant matter. 9/

The protracted failure to file income tax returns over a period of eight consecutive years was sufficient to support the Court's finding that the conduct and intent of the appellant was wilful in respect to each count upon which he was found guilty. Litman v. United States, (3rd Cir. 1957), 246 F.2d 206, 208.

Put simply, notwithstanding his background, training and professional practice, the appellant deliberately and openly chose on repeated occasions to delay indefinitely the filing of his own income tax returns, for personal reasons and motives.

B.

Counsel for defendant argues that this matter should now be returned to the District Court to afford him the opportunity of reviewing the pre-sentence report, citing for this proposition Verdugo

9/ The cases of other Circuits and District Courts cited and urged upon this Court by appellant may be of academic interest; however, the holdings therein are not subscribed to by appellee, nor considered appropriate or controlling in this Circuit.

v. United States of America, (9th Cir., decided May 16, 1968, No. 20803; amended opinion filed October 17, 1968), (____ F.2d ____).

The circumstances concerning the preparation, contents and employment of the presentence report with which the Court was concerned in Verdugo are peculiar to that case, and bear no similarity to the posture of the presentence report concerned in this case.

Interestingly, in Verdugo this Court commented (footnote 17) that due to the particular circumstances of that case it was "unnecessary to consider whether Verdugo's claim should be rejected, because his counsel failed to request the trial judge to disclose the report after having been refused access to the report by the probation officer."

Unlike the situation in Verdugo, counsel for the defendant in this case discussed the presentence report with the probation officer, and was advised by both the probation officer and the Court at the time of sentence that there was "nothing controversial" or involving "moral turpitude" with which to be concerned. ^{10/} In light of these circumstances,

^{10/} Record, pp. 60, 65.

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appellee submits that appellant waived any right to inspect the presentence report.


CONCLUSION

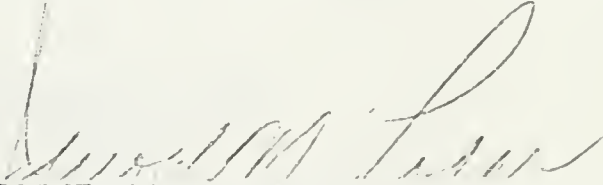
The Government's evidence showed more than a "mere failure to file a return" by appellant. The Government showed that the appellant deliberately made the decision to forego the filing of timely income tax returns for several successive years at the calculated risk of paying penalties and interest. The Government's evidence further showed that despite the availability of records which would have permitted the appellant to have filed such returns, it was only after the appearance of the Government's agents that appellant hastily prepared and filed such returns. In short, the evidence depicts an individual well versed in tax matters, particularly with respect to the preparation and filing of income tax returns, who deliberately took calculated risks in respect to the non-filing of his own tax returns. Surely, such deliberate calculation can only be characterized as wilful.

Accordingly, the judgment should be affirmed.

Respectfully submitted,

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Dated: January 9, 1969



CERTIFICATE OF SERVICE BY MAIL

This is to certify that two copies of the foregoing Brief of Appellee, United States of America, was this date forwarded by Certified Mail, Return Receipt requested, to the Attorney for the Appellant,

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DATED: January 9, 1969.

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